

STATE OF MICHIGAN
IN THE SUPREME COURT

THE DETROIT EDISON COMPANY,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellant.

Supreme Court Case No.: 148753

Court of Appeals Case No.: 309732

Court of Claims No.: 10-104-MT

AMICUS CURIAE BRIEF
OF THE MICHIGAN MANUFACTURERS ASSOCIATION

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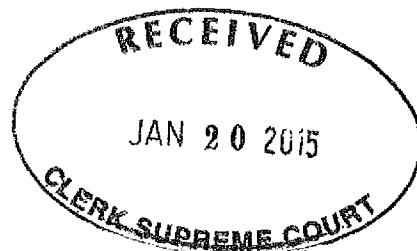


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STATEMENT OF QUESTION PRESENTED

WHETHER THE PURCHASE OF EQUIPMENT WAS PROPERLY FOUND TO BE EXEMPT FROM USE TAX WHEN THE EQUIPMENT IS USED BY DTE TO PROCESS ELECTRICITY BEFORE IT IS A FINISHED GOOD AVAILABLE FOR RETAIL SALE, WHERE TO CONCLUDE OTHERWISE WOULD RESULT IN IMPROPER TAX PYRAMIDING THAT WOULD CAUSE THE INCREASED COST OF DOING BUSINESS TO BE PASSED ALONG TO UTILITY CUSTOMERS, BOTH MANUFACTURERS AND CONSUMERS ALIKE, THEREBY MAKING MICHIGAN AN UNATTRACTIVE PLACE TO DO BUSINESS AND LIVE.

Plaintiff-Appellee DTE Answers: Yes.

Defendant-Appellant Treasury Answers: No.

Amicus Curiae MMA Answers: Yes.

The Court of Claims Answered: Yes.

The Court of Appeals Answered: Yes.

This Court Should Answer: Yes.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Michigan Manufacturers Association (“MMA”) is an association of Michigan businesses, organized and existing to study matters of general interest to its members, to promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and otherwise to promote the general business and economic climate of the State of Michigan. Through effective representation of its membership before the legislative, executive, and judicial branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. A significant aspect of the MMA’s activities involves representing the interests of its members before the state and federal courts, United States and Michigan legislatures, and state and federal administrative agencies. The MMA appears before this Court as a representative of approximately 2,400 private business concerns, all potentially affected by the dispute currently at issue in this case.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan, insofar as manufacturing is the backbone of Michigan’s economy, and is an industry that has grown over the past year. Manufacturing is the largest sector of the Michigan economy generating 18% of the gross state product; it employs 563,000 Michigan residents. Since the U.S. recession ended, from June 2009 through November 2013, employment in Michigan’s manufacturing sector rose by 124,600 jobs (28.4%). Manufacturing has always contributed substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. In fact, manufacturing accounts for 13.8% of total nonfarm employment in Michigan and 44% of nonfarm jobs added in Michigan since the recession ended have been in the

manufacturing sector. Michigan is the national leader in new manufacturing job creation since the recession ended, outpacing the next closest states by about 50%.² Accordingly, the issues in this case substantially affect not only the manufacturing sector, but also the economy of the State of Michigan as a whole, including employment levels, economic growth, tax revenue, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

The issue before the Court is of critical concern for Michigan manufacturers because it involves the affordability of electricity, which is a fundamental necessity for any business owner. Simply put, if Michigan manufacturers lose access to affordable electricity, the state's economy as a whole will suffer. If, as Defendant-Appellant, the Department of Treasury ("Treasury"), contends, DTE's purchase of transmission and distribution equipment is not exempt from use tax, the cost of DTE doing business will increase, and an improper tax pyramiding will result. This is because, in turn, DTE will pass along use tax it pays on such equipment to its customers who already pay sales tax on electricity, including transmission and distribution of electricity, that they purchase from DTE. And, if the cost of electricity is increased to business owners and manufacturers, they, in turn, will pass along the increase to consumers who, like the business owner, will already be paying more for electricity. Overall, this result renders Michigan an unattractive venue for all business owners and has a detrimental effect on Michigan's economy as a whole.

² See generally <http://www.bls.gov/eas/eag.mi.htm>;
http://www.data.bls.gov/timeseries/SMS260000000000000001?data_tool=XGtable; CNBC,
Top U.S. States for New Manufacturing Jobs, 6/25/13.

STATEMENT OF FACTS

Amicus curiae MMA adopts as its own the Counter-Statement of Facts set forth in DTE's Brief on Appeal to this Court.

STANDARD OF REVIEW

Amicus curiae MMA adopts as its own the Counter-Statement of Standard of Review set forth in DTE's Brief on Appeal to this Court.

LAW AND ARGUMENT

THE COURT OF APPEALS PROPERLY HELD THAT DTE IS ENTITLED TO AN EXEMPTION FROM USE TAX FOR EQUIPMENT PURCHASED AND USED TO PROCESS ELECTRICITY BEFORE IT IS A FINISHED GOOD AVAILABLE FOR RETAIL SALE, AND TO HOLD OTHERWISE HAS A DETRIMENTAL EFFECT ON MICHIGAN BUSINESSES AND CONSUMERS ALIKE.

A. DTE's Equipment is Exempt from Use Tax.

Both parties agree DTE is an industrial processor. The dispute in this case is the point at which the industrial processing ends because equipment used up to that point is exempt. The plain language of the Use Tax Act defines when industrial processing ends. "Industrial processing . . . ends when finished goods first come to rest in finished goods inventory storage." MCL 205.94o(7)(a). Because electricity does not reach its final finished form, useable by the customer, until the customer's meter, all equipment used by DTE in the production of electricity prior to that point qualifies for the exemption.

B. Taxing the Equipment At Issue Adversely Impacts the Affordability of Electricity.

Making electricity affordable to Michigan families and businesses alike is a paramount concern of Michigan utility companies such as DTE. "Affordable" energy is not a quantifiable concept subject to non-partisan empirical analysis to prove or disprove its existence. Maintaining energy affordability is instead a challenge public utilities face each day as they

discharge their duty or obligation to serve customers. The concept of affordability is premised on electricity being necessary to conduct modern life as well as a public utility's commitment to deliver electricity to its customers at the lowest cost possible in order to properly serve those customers. Affordable electricity allows a public utility to serve as many customers as possible at the lowest cost possible, from which all benefit. Indeed, the goal of the Governor's Energy Task Force is to, among other things, "enhance Michigan's adaptability, reliability, [and] affordability" of energy.³

The affordability of electricity took on a new urgency in recent years with the retirement of coal-fired plants and the need to replace that capacity, the costs of which when included in rate base will apply upward pressure on customer rates. DTE attempts to mitigate these cost pressures by implementing cost reductions in other areas of its business. (Ex. A., Dec 20, 2013 and Dec. 19, 2014 DTE Energy News Releases) A third of Michigan's coal-fired power plants are 50 years old. Over the next ten years, the figure will reach 75%. Some of DTE's coal-fired plants will remain in operation for the long term, but the maintenance and environmental compliance costs for coal-fired plants must be considered when planning how to best meet customers' electricity needs going forward. DTE has reported that it has been an industry leader in controlling operating costs over the last 10 years. When looked at in total from 2009 through projected 2015-2016, DTE's Operations & Maintenance cost increased at a much slower rate than the rate of inflation.⁴

In furtherance of its commitment to keeping electricity as affordable as possible in Michigan, DTE reported that "[i]n 2014, residential electric customers will see rate decreases of

³ <http://michigan.gov/energy>

⁴ Summary of DTE Electric's Rate Case Filing U-17767, dated December 19, 2014. <https://www2.dteenergy.com/wps/wcm/connect/1bc4dd86-a6ec-4494-a743-f3ac3795e31e/DTE+Electric+Investor+Relations+Summary+Final.pdf?MOD=AJPERES>

6 percent to 7 percent, which translates to an annual savings of about \$80 a year. Similarly, business customer rates will decline by 5.5 percent to 7.4 percent.”⁵ In so reporting, DTE expressed that “improvement is our daily responsibility and we rely on the use of continuous improvement principles and tools, streamlined processes and improved technologies to provide low-cost reliable energy to our customers.”⁶

The affordability of electricity is also a concern of the Michigan Public Service Commission (“MPSC”). In August of 2014, the MPSC directed DTE and Consumers Energy Company to file applications that “examine the cost allocation methods and rate design methods that they use to set rates for their electric customers.”⁷ In doing so, the MPSC directed that the utilities’ “proposals must explore different methods for allocation of production, transmission, distribution and customer-related costs and overall rate design, based on cost of service that support *affordable* and competitive electric rates for all customer classes.”⁸

Thus, as recognized by DTE, Michigan regulatory agencies and the Governor himself, Michigan has a strong interest in keeping electricity affordable.

C. The Tax Pyramiding Effect of the Treasury’s Position is Counter-Productive to Making Electricity Affordable, Has a Detrimental Effect on Businesses and Consumers Alike, and is Bad for Michigan’s Economy as a Whole.

Taxing DTE’s equipment used to process electricity to a finished good useble by its customers would be contrary to MCL 205.94o(7)(a) and impacts affordability of electricity. As DTE notes in its Brief, because customers pay sales tax on retail sales of electricity, including transmission and distribution of electricity, the machinery and equipment that DTE uses to process electricity to a finished good available for sale should not also be subject to use tax,

⁵ <http://www.dtecitizenship.com/customers-keeping-energy-affordable.html>

⁶ *Id.*

⁷ http://www.michigan.gov/lara/0,4601,7-154-10573_11472-334606--,00.html

⁸ *Id.* (emphasis added)

because to do so, as the Treasury urges, would lead to the unfavorable result of tax pyramiding. “Pyramiding occurs when both use and sales taxes are imposed on the production and sale of retail goods. . . . If the end product is taxed, the components used or consumed in its production are not taxed so that the product is not subject to double taxation.” *Elias Bros Restaurants v Dep’t of Treasury*, 452 Mich 144, 152; 549 NW2d 802 (1996) (citation omitted). “Pyramiding causes a tax to violate several principles of good tax policy, including transparency, efficiency, equity and neutrality.”⁹ To be sure, allowing pyramiding to occur in this case would be bad tax policy because if DTE is required to pay an tax on equipment used for industrial processing activities before a finished good useable by the customer is produced, it would pass the increased cost on to businesses and consumers, and, as a result, compromise Michigan’s goal of keeping electricity affordable.

Michigan’s average prices for electricity increased from 2013 to 2014 and are the highest among four other Midwest states -- Indiana, Illinois, Ohio and Wisconsin -- and the national average in every customer sector according to the latest data from the U.S. Energy Information Administration.¹⁰ While there are many reasons for this disparity -- for example, Michigan, unlike Indiana, Illinois and Ohio, does not possess an in-state source of coal, resulting in higher coal transportation costs -- this illustrates higher cost Michigan utilities already face additional pressure to reduce their costs to the extent possible to deliver an affordable, competitive product to Michigan citizens and to attract businesses to locate/remain in Michigan. Double taxation is bad tax policy that would make electricity less affordable.

Indeed, because electricity is part of the cost of *all* products purchased in Michigan, higher energy prices create a domino effect in the local economy, affecting us all. That is, higher

⁹ <http://21stcenturytaxation.blogspot.com/2007/06/tax-pyramiding.html>

¹⁰ http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_6_a

energy prices can drive up the cost of manufacturing and, therefore, the cost of the end products. It is for this reason that protecting a cost-effective, reliable supply of electricity is vital for a prosperous future, not just for Michigan manufacturers, but for the state as a whole. If the price of electricity rises due to the Treasury's tax pyramiding, Michigan families will have no choice but to spend a greater portion of their income on electricity, a basic need, while at the same time paying more for goods. Thus, simply put, if Michigan manufacturers lose access to affordable electricity, the state's economy as a whole will suffer.

The Treasury's position therefore is bad for Michigan business and puts Michigan's economy at risk. This Court should affirm the lower courts' decisions finding that DTE is exempt from paying use tax on its purchases of transmission and distribution equipment used during industrial processing to process electricity to a finished form useable by its customers, because this is good tax policy and produces the right result for Michigan.

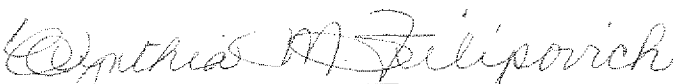
CONCLUSION

For the above-stated reasons, DTE respectfully requests that this Court affirm the Court of Appeals' decision finding that purchases of DTE's electric transmission and distribution equipment qualifies for the use tax exemption.

Respectfully submitted,

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Date: January 20, 2015

News Releases

DTE Energy to lower rates for electric customers**Residential customers to save about \$80 a year**

Dec 20, 2013

DETROIT, Dec. 20, 2013 /PRNewswire/ -- DTE Energy is lowering electric rates by approximately 6.5 percent for its residential electric customers in 2014, due to lower fuel supply costs and on-going efforts to reduce the company's cost structure.

The average residential electric customer will see an annual savings of about \$80. Business customer rates will decline by 5.5 – 7.4 percent, depending on their level of service.

In addition to lower fuel costs, the cost of providing energy from wind has also improved. The lower cost of wind power is due to the declining costs to build our wind parks and higher output from those parks.

DTE's plan calls for an overall reduction of all customer rates – both residential and business – of nearly \$300 million a year.

"We are working hard to keep energy costs down for Michigan customers, and are pleased to offer this plan that will save customers money on their bills," said Gerry Anderson, DTE Energy chairman, president and CEO. "We're pleased that the commission approved this plan, which has been made possible by the continued efforts and hard work of our employees to find savings by using continuous improvement, streamlining processes, controlling operating costs and deploying improved technologies."

The plan was reviewed and approved by the Michigan Public Service Commission.

Anderson said the company is very focused on the need to keep electric service affordable. As Michigan's largest electricity supplier and the largest investor in renewable energy in the state, DTE has led its peer electric utilities in controlling operating costs. Between 2007 and 2012, for example, DTE Energy saw zero increase in its operating costs, compared with an average cost increase of 33 percent at its peer electric companies over the same period.

DTE Energy (NYSE:DTE) is a Detroit-based diversified energy company involved in the development and management of energy-related businesses and services nationwide. Its operating units include DTE Electric, an electric utility serving 2.1 million customers in Southeastern Michigan, DTE Gas, a natural gas utility serving 1.2 million customers in Michigan and other non-utility, energy businesses focused on gas storage and pipelines, power and industrial projects, and energy trading. Information about DTE Energy is available at dteenergy.com, twitter.com/dte_energy and facebook.com/dteenergy.

SOURCE DTE Energy

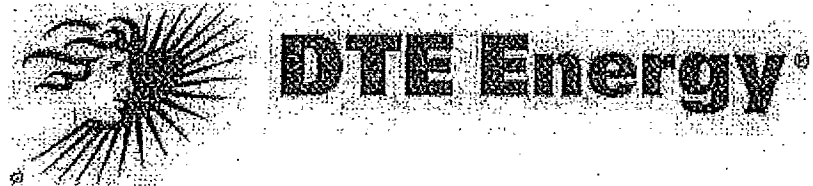
For further information: Alejandro Bodipo-Memba, DTE Energy, (313) 235.3202

News Releases

DTE Electric files first electric residential rate increase in four years**Business customers will see a rate reduction**

Dec 19, 2014

DETROIT, Dec. 19, 2014 /PRNewswire/ -- DTE Electric, a subsidiary of DTE Energy, has filed its first electric residential rate increase in four years.



Because of already-planned rate adjustments, commercial and industrial customers will actually see a rate reduction since the last rate case.

DTE is asking the Michigan Public Service Commission to recover investments made over the last four years to ensure adequate electric supply, improve reliability and install environmental controls at its power plants to reduce emissions.

"DTE has been an industry leader in controlling operating costs over the last 10 years," said Jerry Norcia, president and chief operating officer of DTE Electric. "However, because of the significant investments we're making to ensure that Michigan has adequate and reliable electric supply in the long term, we have requested a rate increase at this time."

If the increase is approved by the MPSC late next year, on average, residential customers will see a \$3.25 increase in their monthly bills since 2013. This represents an annual increase of approximately 1.5 percent and includes other rate offsets in 2014 and 2015.

"We have made, and will continue to make, significant investments," Norcia said. "These investments not only help us deliver cleaner, reliable energy for Michigan's families and businesses, but also make Michigan a more competitive place to do business."

DTE Electric is asking the MPSC to allow recovery of approximately \$3.5 billion of investments made over the last four years. The filing requests a rate increase of \$370 million.

About DTE Energy

DTE Energy (NYSE:DTE) is a Detroit-based diversified energy company involved in the development and management of energy-related businesses and services nationwide. Its operating units include an electric utility serving 2.1 million customers in Southeastern Michigan and a natural gas utility serving 1.2 million customers in Michigan. The DTE Energy portfolio also includes non-utility energy businesses focused on power and industrial projects, natural gas pipelines, gathering and storage, and energy marketing and trading. Information about DTE Energy is available at dteenergy.com, twitter.com/dte_energy and facebook.com/dteenergy.

Logo - <http://photos.prnewswire.com/prnh/20140924/148236>

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